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No. 04-

IN THE

Supreme Court of the United States

WILLIAM DEWALT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should reconsider *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and hold that the enhancement of petitioner's sentence from 20 years to a mandatory life sentence based on a prior conviction that was neither charged in the indictment nor proved to the jury beyond a reasonable doubt violated petitioner's rights under the Fifth and Sixth Amendments.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William DeWalt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-2a) is unpublished. The United States District Court for the District of Montana did not issue an opinion. Portions of the transcript of the sentencing hearing are reproduced at App. 3a-11a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was issued on February 24, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution are set forth at App. 13a. Relevant portions of 21 U.S.C. § 841, which prescribes penalties for unlawful distribution of controlled substances, are set out at App. 12a-15a. The text of 21 U.S.C. § 851, providing for notice that the government will seek enhancement of a sentence based on a prior conviction, is set out at App. 16a-18a. California Health and Safety Code § 11359, which prescribes punishment for possession of marijuana for sale, is set out at App. 19a.

INTRODUCTION

Petitioner William DeWalt is serving a life sentence without the possibility of parole, rather than the statutory minimum 20 year term, solely because the United States Attorney decided to file a post-indictment notice under 21 U.S.C. § 851 invoking a prior conviction for a low-level drug offense that occurred almost twenty years earlier. The existence of a prior conviction was never suggested to the grand jury, included in the indictment, or proved to the petit jury beyond a reasonable doubt. At sentencing, the district court made clear that, absent the government's decision to submit the Section 851 notification, it would have sentenced DeWalt to the statutory minimum sentence of twenty years.

In *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), a sharply divided Court held that a sentence could be enhanced on the basis of a prior conviction so long as the fact of the conviction was proved to the trial court, at sentencing, by a preponderance of the evidence. Since that time, however, the Court has firmly established that any other fact essential to support a statutory sentence enhancement must be treated as an element of the offense for purposes of the Fifth and Sixth Amendments. *See Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); *Ring* v. *Arizona*, 536 U.S. 584 (2002); *United States* v. *Booker*, 125 S. Ct. 738 (2005). In light of those intervening decisions, the Justice who provided the deciding vote in *Almendarez-Torres* has indicated that the

case should be reconsidered. *Shepard* v. *United States*, 125 S. Ct. 1254, 1264 (2005) (Thomas, J., concurring). That reconsideration should take place before DeWalt—a 47 year-old man—is sent to prison for the rest of his life on the basis of a prior conviction that the government did not allege before the grand jury or prove at trial, and that the sentencing court made clear it would have chosen to ignore.

FACTUAL AND PROCEDURAL BACKGROUND

1. Petitioner William DeWalt is a veteran of the United States Navy who, in 1985, suffered a debilitating workplace injury that left him permanently disabled and in constant pain. As a result of his injuries, DeWalt became unemployed and developed a dependency on pain medication. In 1986, California charged him with possessing a small quantity of marijuana for sale, in violation of California Health & Safety Code § 11359. DeWalt pleaded guilty in exchange for a sentence of time served—approximately 10 days in the local jail.

DeWalt later moved to Montana where, to manage his chronic pain, DeWalt's physician at the local Veterans Administration hospital prescribed methadone pills. By 2002, DeWalt was being prescribed 420 pills each month of the "Methadose" brand of methadone.

On July 20, 2002, Eric Zeigler was found dead in his girlfriend's home in Hamilton, Montana. An autopsy revealed traces of the drug methadone in his system. After a brief investigation, law enforcement officers interviewed DeWalt who candidly admitted having sold Ziegler 20 Methadose pills for $200. DeWalt has never denied having provided Methadose to Ziegler, but he has contested whether the drugs he supplied were the cause of Ziegler's death.

2. a. A grand jury charged DeWalt with distribution of a controlled substance resulting in death, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). In plea negotiations, DeWalt indicated that he was prepared to plead guilty to distribution of a con-

trolled substance and to the firearms charge. He contested, however, the government's charge that the Methadose he provided had caused Ziegler's death.

After DeWalt refused to plead to that charge, the United States Attorney filed a notice under 21 U.S.C. § 851 indicating that if DeWalt were convicted, the government would seek enhancement of his sentence based on his 1986 marijuana conviction. That offense, while clearly minor given the 10-day sentence it entailed, was technically a "felony drug offense" for purposes of 21 U.S.C. § 841(b)(1)(C), because the California statute under which DeWalt was convicted does not limit all sentences to one year or less.[1] The facts and circumstances of DeWalt's particular conviction were never presented to the grand jury, alleged in the indictment, or proved to the trial jury.[2]

b. DeWalt was tried and convicted in March 2003. After a lengthy delay caused by litigation over a newly discovered witness—who, had a new trial been granted, would have testified that she had seen Ziegler injecting conventional methadone, rather than Methadose of the sort he re-

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[1] The term "felony drug offense" is defined to include "an offense that is punishable by imprisonment for more than one year under any law of . . . a State . . . that prohibits or restricts conduct relating to . . . marihuana." 21 U.S.C. § 802(44). The California statute under which petitioner pled guilty provides that "Every person who possesses for sale any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison." App. 19a. As a practical matter, however, violators typically receive only probation or a period of imprisonment far less than one year. *See e.g., In re Cohen*, 11 Cal. 3d 416, 417-418, 521 P.2d 477 (1974) (three years of probation and 120 days in custody of sheriff); *In re Resendiz*, 25 Cal. 4th 230, 236, 19 P.3d 1171 (2001) (three years probation and 180 days in jail); *People* v. *Bennett*, 196 Cal. App. 3d 1054, 1055 (Cal. Ct. App. 1987) (three years probation and 90 days in prison); *People* v. *Middlebrook*, 2001 WL 1337584, at *1 (Cal. Ct. App. 2001) (term of probation).

[2] Prior to trial, in order to avoid the prejudice that would result from introducing the fact of the prior conviction to the jury, *see Old Chief* v. *United States*, 519 U.S. 172, 180-181 (1997), trial counsel stipulated to the prior conviction.

ceived from DeWalt, shortly before he died—the district court sentenced DeWalt in March 2004. Because of the government's post-indictment notice under 21 U.S.C. § 851 and the statutory categorization of DeWalt's prior conviction as a "felony drug offense," the government argued that the court must impose a mandatory minimum sentence of life imprisonment under 21 U.S.C. § 841(b)(1)(C). DeWalt argued that imposing a life sentence on that basis would violate his Fifth and Sixth Amendment rights under *Apprendi* v. *New Jersey* and similar cases. App. 5a-7a. The district court rejected that argument on the basis of this Court's decision in *Almendarez-Torres* that different constitutional rules apply to sentence enhancements based on prior convictions. *Id.*

The district court made clear that, absent the government's decision to file the Section 851 information, the court would have sentenced DeWalt to the statutory minimum sentence of 20 years: "I am sure that a life sentence is probably inappropriate. I think the sentencing guidelines and the mandatory minimum sentence that this Congress has enacted, that would have had a mandatory minimum of 20 years, would have been an appropriate sentence in this case." App. 8a-9a. Indeed, the court specifically criticized the government's decision to seek the enhancement:

> I would not have imposed a life sentence if I had the choice. I think that the guidelines and the statutory minimum would have been the appropriate sentence in this case. I am only giving you a life sentence because of a decision made by the United States Attorney. An arbitrary decision, in my view.

App. 10a. In the court's view, giving the government discretion to force an enhanced sentence by deciding to submit the information stripped the court of its proper sentencing authority: "[I]f we're going to sentence somebody and have a meaningful sentencing, it ought not to be, in my view, the United States Attorney [who] decides what the sentence is." App. 3a.

3. The court of appeals affirmed. App. 1a-2a. After rejecting DeWalt's argument that he was entitled to a new trial on the basis of the witness first discovered after trial (App. 2a), the court addressed DeWalt's argument that his sentence was unconstitutionally enhanced on the basis of a prior conviction that was neither included in the indictment nor proved to the trial jury. The court of appeals rejected that argument solely on the basis of *Almendarez-Torres*. *Id.*

REASONS FOR GRANTING THE PETITION

In *Almendarez-Torres* v. *United States*, a divided Court held that a prior conviction could be used to enhance a sentence, even above an otherwise applicable statutory maximum, based only on proof to the judge at sentencing. The majority declared it "absolutely clear" that Congress could "permit judges to increase a sentence in light of recidivism, *or any other factor*," even if the factor was "not set forth in an indictment and proved to a jury beyond a reasonable doubt." 523 U.S. 224, 240 (1998) (emphasis added).

In the intervening seven years, this Court's Fifth and Sixth Amendment jurisprudence has undergone a "watershed change." *Apprendi* v. *New Jersey*, 530 U.S. 466, 524 (2000) (O'Connor, J., dissenting). In *Apprendi*, this Court held that any fact necessary to authorize additional punishment must be charged in an indictment, alleged to the jury, and proved beyond a reasonable doubt. *Id.*. at 490; *see also Jones* v. *United States*, 526 U.S. 227, 252-253 (1999) (Stevens, J., concurring); *id.* at 253 (Scalia, J., concurring); *Ring* v. *Arizona*, 536 U.S. 584 (2002); *Blakely* v. *Washington*, 124 S. Ct. 2531, 2536 (2004); *United States* v. *Booker*, 125 S. Ct. 738, 756 (2005).

While *Apprendi* did not extend its rule to "the fact of a prior conviction," 530 U.S. at 490, because of the prior holding in *Almendarez-Torres*, that holding cannot be reconciled with the *Apprendi* line of cases. Numerous lower courts have recognized the inconsistency, but they are bound to follow *Almendarez-Torres*. Only this Court can overrule it.

This case offers a timely opportunity for the Court to reconsider *Almendarez-Torres*. The question presented is clearly one of substantial public importance, given the high number of offenders whose sentences are enhanced based on prior convictions, the ubiquity of criminal history as a sentencing factor, and the importance of the constitutional rights at stake. No purpose would be served by deferring consideration, because *Almendarez-Torres* clearly controls the issue unless and until it is overruled. And this case is an appropriate vehicle for reconsidering the requirements for proof of a prior conviction, because the trial judge made clear on the record that he would not have imposed a life sentence but for the government's decision to submit a post-indictment information alleging such a conviction.

1. In several recent opinions, this Court has repeatedly called into question the continuing viability of *Almendarez-Torres*. In *Apprendi* itself, the Court characterized *Almendarez-Torres* as "at best an exceptional departure from . . . historic practice." 530 U.S. at 487. It further acknowledged, "[i]t is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Id.* at 489-490. In a footnote, the Court not only endorsed Justice Scalia's dissent in *Almendarez-Torres*, but also went out of its way to advance an independent reason for questioning the prior conviction exception: "the Court's extensive discussion of the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue," namely the rule that an "'indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.'" *Id.* at 489 n.15 (emphasis added) (quoting *United States* v. *Reese*, 92 U.S. 214, 232-233 (1875) (Clifford, J., dissenting)).

In *Apprendi*, this Court declined to overrule *Almendarez-Torres* for prudential reasons—the statutory enhancement at issue in *Apprendi* was not based on recidivism, *see* 530 U.S. at 489-490 ("Apprendi does not contest the decision's validity and we need not revisit it for purposes of our

decision today"). The *Almendarez-Torres* holding nonetheless has "been eroded..., and a majority of the Court now recognizes that [it] was wrongly decided." *Shepard* v. *United States*, 125 S. Ct. 1254, 1264 (2005) (Thomas, J., concurring) (citing *Almendarez-Torres*, 523 U.S. at 248-249 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) and *Apprendi*, 530 U.S. at 520-521 (Thomas, J., concurring)).

In *Shepard*, a plurality of this Court consisting of Justices Stevens, Scalia, Ginsburg and Souter, narrowed the scope of the *Almendarez-Torres* exception in order to avoid "serious risks of unconstitutionality." 125 S. Ct. at 1263. Concerned that a wide-ranging judicial enquiry into the disputed generic character of a prior conviction would run afoul of *Apprendi*, Justice Souter interpreted the Armed Career Criminal Act "to limit the scope of judicial factfinding" to facts not "too far removed from the conclusive significance of a prior judicial record." *Id.* at 1262-1263. Although the parties in *Shepard* did not request the Court to reconsider the prior conviction exception altogether, Justice Thomas—who was in the five-Justice majority in *Almendarez-Torres*—noted in a concurring opinion that "in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability." *Id.* at 1264 (Thomas, J., concurring) (internal quotation omitted).

A number of lower courts also have noted that *Almendarez-Torres* and *Apprendi* cannot be reconciled. *See, e.g.*, *United States* v. *Rodriguez-Montelongo*, 263 F.3d 429, 434 (5th Cir. 2001) ("*Apprendi* cast doubt on the continued validity of *Almendarez-Torres*"); *United States* v. *Davis*, 260 F.3d 965, 969 (8th Cir. 2001) ("A close examination of Supreme Court cases casts further doubt on the future viability of *Almendarez-Torres*."); *Jones* v. *Smith*, 231 F.3d 1227, 1235 (9th Cir. 2000) (stating that *Apprendi* calls *Almendarez-Torres*'s "continuing viability into serious question").

2. Questions concerning the viability of one of this Court's precedents are not tolerable when they pertain to an issue of such substantial importance. At stake in this case

are Fifth and Sixth Amendment rights that this Court has characterized as "constitutional protections of surpassing importance." *Apprendi*, 530 U.S. at 476. As the Court has recently made clear, *Apprendi* and its progeny are animated by a concern to "guarantee a jury standing between a defendant and the power of the state." *Shepard*, 125 S. Ct. at 1262. By requiring that all facts essential to punishment be alleged in an indictment, *Apprendi* ensures that the grand jury, a representative of the community, can protect defendants from overzealous prosecution by "devis[ing] extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant." *Apprendi*, 530 U.S. at 479 n.5; *see also United States* v. *Cotton*, 535 U.S. 625, 634 (2002) ("The Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power."); *Jones*, 526 U.S. at 245; *United States* v. *Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion) (Burger, C.J.) ("[The] historic office [of the grand jury] has been to prove a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance."); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) ("Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.").

Furthermore, the constitutional protection afforded defendants whose sentences may be enhanced based on prior convictions is an issue that affects numerous cases each year. As this Court has noted, "prior commission of a serious crime. . . is as typical a sentencing factor as one might imagine," *Almendarez-Torres*, 523 U.S. at 230. Indeed, at least 57.7% of all federal criminal convictions, and 44.9% of federal

drug convictions in 2003, involved offenders with prior convictions. United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics* tbls. 21, 37 (summing criminal history categories II-VI). As a consequence, "[i]nnumerable criminal defendants" have been and are being sentenced under the *Almendarez-Torres* rule. *Shepard*, 125 S. Ct. at 1264 (Thomas, J., concurring).

A review of *Almendarez-Torres* should be undertaken promptly. As long as that case remains unexamined by this Court, every sentence enhanced by the fact of a prior conviction will remain under a cloud of constitutional doubt. Moreover, none of the factors that sometimes warrant delaying a grant of certiorari is present here. This Court cannot wait for the issue to "percolate" or for a conflict to develop in the lower courts. It has directed the State and Federal courts to treat its precedents as controlling when they have "direct application," even if they "appear to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express*, 490 U.S. 477, 484 (1989). Courts have followed this directive and thus have treated *Almendarez-Torres* as authoritative despite its having been called into question by this Court's more recent decisions. *See, e.g.*, *United States* v. *Reyes-Maya*, 305 F.3d 362, 365-366 (5th Cir. 2002); *Davis*, 260 F.3d at 969; *United States* v. *Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000).

3. The doubts articulated by members of this Court and other courts concerning *Almendarez-Torres*'s continuing viability are justified. The fact of prior conviction is not meaningfully different from other facts that are "legally essential to the punishment to be inflicted." *Apprendi*, 530 U.S. at 489 n.15 (quoting *Reese*, 92 U.S. at 232-233 (Clifford, J., dissenting)). The need for a grand jury to serve as "a kind of buffer or referee between the Government and the people," *United States* v. *Williams*, 504 U.S. 36, 47 (1992), is no less urgent when a sentence is enhanced based on the fact of a prior conviction than when a sentence is enhanced based on any other fact. In either case, a defendant can see his "potential sentence balloon" without any "warning in either

his indictment or plea," *Blakely*, 124 S. Ct. at 2542, purely due to a discretionary decision by the prosecutor.

The facts of this case offer an unfortunate demonstration of this point. Relying on 21 U.S.C. § 851, the prosecutor decided entirely on his own to pursue an enhancement from a mandatory sentence of 20 years in prison to a mandatory life sentence based on DeWalt's prior conviction. The grand jury's purpose is to ensure that defendants are treated fairly, by policing prosecutorial discretion of just this sort—discretion that was, in the judgment of the sentencing court, exercised "arbitrar[ily]" in this case (App. 10a), "apparently depend[ing] upon . . . 'What . . . the U.S. Attorney [had] for breakfast'" (App. 5a). The sentencing judge further emphasized, "I would not have imposed a life sentence if I had the choice . . . I am only giving . . . a life sentence because of a decision made by the United States Attorney. An arbitrary decision, in my view" (App. 10a). Thus, this case bears out Justice Scalia's warning that *Almendarez-Torres* is "a grave constitutional error affecting the most fundamental of rights." *Monge* v. *California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting).

4. The fact that this case involves an increase in the mandatory minimum rather than an increase in the statutory maximum should not prevent this Court from granting certiorari. This Court has repeatedly held that when a sentencing "range fixed by Congress is so broad, and the enhancing role played by the relevant [sentencing factor is] so significant" that it becomes "'a tail which wags the dog of the substantive offense,'" *Witte* v. *United States*, 515 U.S. 389, 403 (1995) (quoting *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986)), the factor is functionally equivalent to an element of the offense and thus must be indicted and proved to a jury. *McMillan*, 477 U.S. at 88; *see also Booker*, 125 S. Ct. at 805 (Breyer, J., dissenting); *but see Harris* v. *United States*, 536 U.S. 545, 566 (2002) ("That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element."). This analysis applies to an increase in a manda-

tory minimum. *McMillan*, 477 U.S. at 88 (applying the test to such a case).

In *Mullaney* v. *Wilbur*, the Court struck down a Maine statute that imposed a mandatory life sentence on any defendant who committed an intentional and unlawful killing unless the defendant proved that he or she acted in the heat of passion. 421 U.S. 684, 700 (1975). A critical factor in the Court's determination that absence of heat of passion was an essential element of the crime of murder was the extent of the increase in the minimum sentence confronting the defendant: He faced "a differential in sentencing ranging from a nominal fine to a mandatory life sentence." *Id.*

In *McMillan*, this Court confirmed that the constitutionality of an increase in a mandatory minimum that depends on an unindicted and unproven fact turns on the extent of the enhancement. In upholding a five-year mandatory minimum based on a fact found by the judge, this Court distinguished *Mullaney* on the ground that the defendant in *McMillan* did not face "a differential in sentencing ranging from a nominal fine to a mandatory life sentence." 477 U.S. at 87 (quoting *Mullaney*, 421 U.S. at 700). In *Harris* v. *United States*, this Court explicitly reaffirmed *McMillan*, while concluding that "[b]asing a 2-year increase in the defendant's minimum sentence on a judicial finding... does not evade the requirements of the Fifth and Sixth Amendments." 536 U.S. at 568. Although the *McMillan* line of analysis was questioned in *Blakely*, 124 S. Ct. at 2539-2540, it has not been overturned, and *Blakely* itself recognized the unfairness of a sentencing regime in which a defendant's potential sentence "balloon[s]... based... on facts [not] proved to his peers." *Id.* at 2542.

The sentencing increase applied to DeWalt is a far cry from "[t]he incremental changes in the minimum—from 5 years, to 7, to 10" that this Court considered and accepted in *Harris*. 536 U.S. at 554. Rather, the increase in the mandatory minimum—here, from 20 years to life in prison—is so large that the enhancement can fairly be said to "alter[] the defendant's punishment in a manner not usually associated

with sentencing factors." *Id.* The bulk of DeWalt's sentence is due not to the substantive offense, but to the prior conviction enhancement—based on an offense to which he pled guilty nearly 20 years ago in exchange for 10 days' time served. Lower courts have held that similarly large increases in mandatory minimums based on sentencing factors run afoul of due process. *See, e.g., United States* v. *Rebmann*, 321 F.3d 540, 544 (6th Cir. 2003) (holding that an increase in the defendant's sentence from 30 months to 20 years runs afoul of due process under *McMillan*); *United States* v. *Kikumura*, 918 F.2d 1084, 1100-1101 (3d Cir. 1990) (finding that an increase in the defendant's sentence from 30 months to 30 years is "perhaps the most dramatic example imaginable of... a tail which wags the dog of the substantive offense." (internal quotation marks omitted)). The massive increase in DeWalt's mandatory minimum sentence makes the recidivism sentencing factor functionally equivalent to an element of the substantive offense. *Apprendi* should therefore apply.

CONCLUSION

This Court should grant DeWalt's petition and issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Alternatively, if the Court is inclined to revisit its decision in *Almendarez-Torres* in another case, petitioner respectfully requests that the Court hold this petition in abeyance until a decision is reached on the merits of that case.

Respectfully submitted,

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